

BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF DELAWARE

IN THE MATTER OF THE FORMAL *
COMPLAINT OF EMBLEM ASSOCIATES, *
LLC AGAINST ARTESIAN WATER *
COMPANY, INC. REGARDING A *
CONTRIBUTION-IN-AID-OF- *
CONSTRUCTION (CIAC) DISPUTE *

PSC Docket No. 16-0008

(filed January 6, 2016)

**ARTESIAN WATER COMPANY, INC.'S
POST EVIDENTIARY HEARING BRIEF**

Artesian Water Company, Inc.
664 Churchmans Road
Newark, DE 19702
Telephone: (302) 453-6900
Facsimile: (302) 453-6957
E-mail: artesian@artesianwater.com

MORRIS, NICHOLS, ARSHT & TUNNELL
R. Judson Scaggs, Jr. (#2676)
Karl G. Randall (#5054)
1201 N. Market Street
P.O. Box 1347
Wilmington, DE 19899-1347
Telephone: (302) 658-9200
Facsimile: (302) 658-3989
E-mail: krandall@mnat.com

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I. INTRODUCTION

A. Nature And Stage Of The Proceeding.

On January 6, 2016 Emblem Associates, LLC (“Emblem”) filed with the Delaware Public Service Commission (the “Commission”) a formal complaint (the “Complaint”) against Artesian Water Company, Inc. (“Artesian” or the “Company”) relating to a contribution-in-aid-of-construction (“CIAC”) charge that Artesian assessed to Emblem. On January 28, 2016 Artesian filed an Answer denying Emblem’s right to relief.

By letter dated January 29, 2016 the Commission’s Executive Director referred this proceeding to Senior Hearing Examiner Mark Lawrence (the “Hearing Examiner”) for the purpose of conducting proceedings that the Hearing Examiner deemed necessary to develop a full and complete record. In accordance with a stipulated schedule the parties exchanged data requests and produced discovery. The Hearing Examiner convened a public evidentiary hearing on June 1 and 3, 2016. The evidentiary record closed at the end of the hearing.

This is the Company’s Post Evidentiary Hearing Brief in opposition to Emblem’s claims and the awarding of any relief to Emblem.

B. Standard of Review.

Through PSC Order No. 8893, dated May 30, 2016, the Hearing Examiner ruled that Artesian bears the burden of proof in this proceeding.¹ The burden of proof is whether the CIAC charge that Artesian assessed to Emblem is “just and reasonable.” 26 Del. C. § 307(a).

¹ Artesian reserves the right to take exception to the Hearing Examiner’s burden of proof ruling. Regardless, as explained herein, the record proves that the CIAC charge Artesian assessed to Emblem is just and reasonable.

C. Opening Statement.

One unusual aspect of this case mentions merit at the outset. If Artesian wished to resolve this proceeding in the manner that maximized its profits and benefited its stockholders the most, it would acquiesce in Emblem's claims that the developer should not pay CIAC. This is so because Delaware's legislature has mandated, through 26 Del. C. § 302 ("Section 302"), that unless certain circumstances not present in this proceeding exist, the costs of used and useful utility plant must be recovered in rates charged to customers. If the utility plant expense at issue (the "273 Main") is not collected through CIAC, Section 302 provides that it must be included in rate base. *Id.* If the utility plant expense is included in rate base, Artesian is allowed to earn a rate of return upon that investment, which will result in higher water rates. PSC Order No. 6814 at Ex. A ¶ 33; Tr. 127:8-128:9.² Conversely, if Artesian recovers the utility plant expense through a CIAC payment, the result will be a reduction in rate base and water rates. Tr. 128:10-17.

The concern that water utilities were negotiating arrangements that favored developers and the utilities at the expense of existing customers was what motivated the staff ("Staff") of the Public Service Commission (the "Commission") and the Division of Public Advocate ("DPA") to seek a reopening of Regulation Docket No. 15 ("Docket 15") in 2003. PSC Order No. 6814 at Ex. A ¶¶ 1, 9, 25, 33, 38 (Jan. 10, 2006). The Docket 15 hearing examiner, and ultimately the Commission, concluded that certain Class A water utilities had filed more frequent rate cases and had obtained large increases in rates in part because of under-

² References to pre-filed testimony and other exhibits that the Hearing Examiner admitted into evidence during the evidentiary hearing in this docket are cited herein as "Ex. __" or "Ex. __ at __" and references to the Hearing Transcript are cited as "Tr. __".

collection of expansion costs from developers. *Id.* ¶ 2 & Ex. A ¶ 45; PSC Order No. 6873 ¶ 1 (Mar. 14, 2006). The Commission consequently mandated the collection of CIAC from developers to protect existing customers from paying the costs associated with development. PSC Order No. 6814 at Ex. A.³

Although the financial interests of Artesian's stockholders are aligned with Emblem's interest in not having the utility plant expense at issue recovered through a CIAC payment, Artesian has incurred the expense of retaining counsel and appearing to refute Emblem's claims. Artesian has done so for two reasons. Tr. 131:16-132:7. First, the law requires it. As will be explained below in Section II of this brief, the Commission's CIAC regulations (each "Regulation 3.8", *etc.* and collectively the "Regulations") require Artesian to assess a CIAC charge to Emblem. Second, and as importantly, it is appropriate for Artesian to defend its current customers from increased rates by disproving Emblem's contentions and to set the correct precedent from the rate payers' perspective in future CIAC disputes.

D. Chronology.

The following chronology of events may assist with understanding the facts:

1/2/02	Christiana Fashion Center (" <u>Fashion Center</u> ") asks Artesian for a New Castle County Water Capacity Certification (" <u>WCC</u> "). Ex. 17.
3/14/06	The Regulations take effect. PSC Order No. 6873.
7/31/07	Delaware's Superior Court rejects the contentions of The Home Builders Association of Delaware, Inc. (the " <u>Association</u> ", of which at least one of Emblem's affiliates or owners was a member) and The Reybold Group (" <u>Reybold</u> "), holding that the Regulations are a valid exercise of the Commission's powers. <i>Reybold Grp. v. Pub. Serv. Comm'n</i> , 2007 WL 2199677, at *11 (Del. Super. July 31, 2007).

³ It appears that, prior to the Evidentiary Hearing, Emblem did not understand this dynamic. For example, in its pre-filed direct testimonies, Emblem states repeatedly that the Commission's CIAC regulations "allow" utilities to assess CIAC, as if it would benefit the utilities to do so. *See* Ex. 112 at 11:7-9; *id.* at 12:15-17.

2/6/08 Delaware's Supreme Court affirms the Superior Court's rulings that the Regulations are valid. *Reybold Grp. v. Pub. Serv. Comm'n*, 956 A.2d 643, 643 (Del. 2008) (table).

2/1/10 Emblem's affiliate asks Artesian for a New Castle County WCC for the development at issue in this docket, indicting a Project Start Date and Date Water Service Required of 2011. Ex. 18.

2/16/10 Artesian provides Emblem's affiliate a New Castle County WCC without mentioning CIAC. Ex. 1.

6/28/10 Artesian provides Fashion Center a New Castle County WCC without mentioning CIAC. Ex. 17 at AWC0008.

10/5/10 The Office of Drinking Water ("ODW") at Delaware Health and Social Services issues Emblem's affiliate approval to construct by 10/5/11, copying Artesian. Ex. 19.

9/20/11 Emblem's affiliate asks ODW for a one year extension of approval to construct without copying Artesian. Ex. 23; Tr. 360:24-361:14.

9/20/11 ODW grants Emblem's affiliate a one year extension of approval to construct. Artesian is not informed. Ex. 22; Tr. 362:19-363:1; *id.* 364:16-365:3.

8/29/12 Emblem's affiliate asks ODW for a one year extension of approval to construct without copying Artesian. Ex. 25; Tr. 363:2-10.

8/29/12 ODW grants Emblem's affiliate a one year extension of approval to construct. Artesian is not informed. Ex. 24; 363:11-16; *id.* 364:16-365:3.

10/23/12 Cabela's asks Artesian for a New Castle County WCC, indicating a project start date of 1/1/13. Ex. 26.

10/28/12 Cinemark asks Artesian for a New Castle County WCC, indicating a project start date of 7/1/13. Ex. 27.

12/6/12 Artesian provides the developer of Cabela's and Cinemark New Castle County WCCs with a cover letter stating CIAC will be required, but not stating the amount. Ex. 15 at EA 000048-51.

1/14/13 Artesian provides The Market Place at Christiana a New Castle County WCC with a cover letter stating CIAC will be required, but not stating the amount. Ex. 15 at EA000054-55.

5/31/13 Artesian informs the developer of Cabela's and Cinemark that CIAC must be paid, the amount is being calculated, and the methodology by which it will be allocated among several developers. Ex. 28.

6/7/13 Artesian makes its first rough calculation of each developer's share of the CIAC charges at issue. Ex. 29; Tr. 168:2-169:8.

6/10/13 Emblem's affiliate asks ODW for a one year extension of approval to construct without copying Artesian. Ex. 31; Tr. 363:17-23.

6/10/13 ODW grants Emblem's affiliate a one year extension of approval to construct. Artesian is not informed. Ex. 30; Tr. 363:24-364:4; *id.* 364:16-365:3.

6/30/13 As of at least this date, no one from Emblem or its affiliates or agents had contacted Artesian about its development since receiving a WCC in February 2010. Tr. 364: 5-15.

7/1/13 The developer of Cabela's and Cinemark contracts with Artesian for water service, pays CIAC, and they start using Artesian's water. Ex. 34.

7/26/13 Artesian's engineering department analyzes the projected consumption of the new developments at the Mall and calculates that they account for approximately 50% of the design capacity of the new booster station. Ex. 78 at EMB-DR3-005 to 06. Artesian allocates half the cost of the booster station to the five new developments as CIAC and half to current customers for inclusion in rates. Tr. 143:15-144:10.

8/29/13 Artesian informs Fashion Center via email that it must pay CIAC, the amount that it owes, and the methodology by which the amount was allocated among several developers. Ex. 36.

11/15/13 Artesian has refined calculations of the costs of the facilities and the CIAC owed by each developer. Ex. 38 at AWC0060.

2/24/14 Fashion Center contracts with Artesian for water service, pays CIAC, and starts using Artesian's water. Ex. 39; Ex. 40.

4/14 Artesian mails a Construction Notification Letter to all landowners along the route where Artesian is installing the 273 Main notifying them of the installation. Ex. 86.

4/16/14 Emblem's affiliate receives Artesian's Construction Notification Letter about the installation of the 273 Main and assumes it does not concern its property. Ex. 4; Tr. 365:21-368:14; *id.* 371:12-372:7.

4/14 Emblem's parent entity sends people to monitor Artesian's work as it installs the 273 Main in front of its property. Tr. 366:10-368:14.

8/19/14 The contractor for Emblem's parent entity informs it that the Fire Marshal will not accept Artesian's flow test from 2009 that was part of Emblem's WCC package. Ex. 107 at EA000085.

8/20/14 The contractor for Emblem's parent entity orders a new flow test from Artesian. Ex. 107 at EA000087.

8/21/14 The contractor for Emblem's parent entity informs it that Artesian is finishing an upgrade to the system in the area of its development that will increase flow and pressure at its property. Ex. 107 at EA000091.

8/22/14 Emblem's affiliate asks Artesian to proceed with the pressure test to "get the building process moving". Ex. 107 at EA000096.

9/16/14 Artesian provides the contractor for Emblem's parent entity with a flow test. Ex. 107 at EA000097.

9/16/14 Emblem's affiliate asks ODW for a one year extension of approval to construct without copying Artesian. Ex. 42; Tr. 365:5-18.

9/16/14 ODW grants Emblem's affiliate a one year extension of approval to construct. Artesian is not informed. Ex. 41; 364:16-365:18.

6/4/15 Plaintiff Emblem Associates, LLC is formed as a Delaware entity. Ex. 64; Tr. 358:8-11.

6/15 Emblem closes the financing for its development. Tr. 358:12-17.

7/21/15 Emblem's contractor asks Artesian for permission to tap into Artesian's system. Ex. 45.

7/24/15 Artesian informs Emblem via email that it must pay CIAC, the amount that it owes, and the methodology by which the amount was allocated among several developers. Ex. 46.

7/15-present Emblem disputes it must pay CIAC.

10/1/15	Artesian's engineers do modeling to determine the minimum size line that can provide fire flow protection to Emblem if it does not contribute to the new booster station. Ex. 58.
10/2/15	Artesian informs Emblem of its fire flow calculations and, in an effort to compromise, reduces the amount of CIAC Emblem must pay. Ex. 59.
11/5/15	Connie S. McDowell of Staff informally mediates the parties' dispute and concludes that Emblem must pay the CIAC charge. Ex. 66.
1/6/16	Emblem files a complaint with the Commission, initiating this docket.
1/26/16	Emblem contracts with Artesian for water service and pays CIAC under protest. Ex. 68; Ex. 69.
3/16	Emblem connects to Artesian's water system and starts using water. Tr. 346:20-22.
Present	Emblem's community is neither fully developed nor, to Artesian's knowledge, occupied. Market Place has not informed Artesian of the status of its project since receiving a WCC in January 2013.

II. THE COMMISSION'S CIAC REGULATIONS REQUIRE ARTESIAN TO ASSESS A CIAC CHARGE TO EMBLEM IN THE CIRCUMSTANCES OF THIS CASE, AND THE AMOUNT THAT ARTESIAN ASSESSED IS APPROPRIATE.

The CIAC Regulations that the Commission has adopted require Artesian to assess a CIAC charge to Emblem for the 273 Main that Artesian installed to ensure safe and reliable water service to the new Emblem development. Accordingly, Emblem should be required to pay the CIAC charge and its Complaint should be dismissed with no relief granted.

A. The Commission Adopted The Current CIAC Regulations Following Public Proceedings In Docket 15, In Which The Commission Determined That, Generally, Developers Rather Than Existing Customers Should Pay For Extending Water Service To New Developments.

On June 17, 2003, through PSC Order No. 6198, the Commission reopened Docket 15 to consider whether changes to its approach to CIAC and Advances were necessary. *See* PSC Order No. 6873 at sixth Whereas clause. The impetus for reopening Docket 15 was concerns that Staff and DPA had expressed in water utility rate proceedings that the utilities were collecting inadequate CIAC and Advances from developers, leading to more frequent rate proceedings, large increases in rates, and ultimately existing customers bearing the costs of

expanding water service to new developments. *Id.* at third Whereas clause. Following many months of public proceedings, during which a proposed set of CIAC regulations were deliberated (*id.* at seventh and eighth Whereas clauses), the presiding hearing examiner issued a report of proposed findings and recommendations on November 18, 2005 in which he recommended adoption of a revised set of regulations proposed by Staff (*id.* at tenth Whereas clause). On December 20, 2005, the Commission conducted a public hearing, during which it heard exceptions taken from the hearing examiner's report and voted unanimously to adopt the report and denied the exceptions. *Id.* at eleventh Whereas clause.

On January 10, 2006, the Commission issued PSC Order No. 6814 adopting the hearing examiner's Docket 15 report and directing that the proposed regulations be publicly published for comment. *Id.* at twelfth Whereas clause. On March 3, 2006 the Commission received and considered written comments against adoption of the proposed CIAC regulations from the Association and Reybold. *Id.* at thirteenth Whereas clause. Notably, at least one of Emblem's affiliates or owners was a member of the Association during these Docket 15 proceedings. Ex. 107 at Response to Request No. 7. The Commission held a public hearing on March 14, 2006 to consider final adoption of the proposed regulations. PSC Order No. 6873 at fifteenth Whereas clause. At that time the Commission adopted PSC Order No. 6814 in its entirety (thereby again adopting the Docket 15 hearing examiner's report, which is incorporated into Order No. 6814 as Exhibit "A"). *Id.* ¶ 1. The Commission concluded that the Association's and Reybold's submissions did not raise new issues and rejected them for the reasons set forth in Order No. 6814. *Id.* Accordingly, the Commission adopted the current CIAC regulations (*id.* ¶ 2), which are codified as Title 26 Del. Admin. C. § 3.8 *et seq.*

Following the Commission's adoption of the new CIAC Regulations, the Association and Reybold appealed to the Superior Court. The Association and Reybold asserted a variety of procedural and substantive arguments in that suit, and raised both factual and legal issues, but ultimately contended that the Commission lacked authority to shift water expansion costs from the water utilities' current customers onto new customers by imposing some of those costs on land developers. *Reybold Grp. v. Pub. Serv. Comm'n*, 2007 WL 2199677, at *1 (Del. Super. Ct. July 31, 2007), available at Ex. 109. The Superior Court rejected the developers' contentions, holding that the Regulations were a valid exercise of the Commission's powers. *Reybold Group*, 2007 WL 2199677, at *11. The Delaware Supreme Court affirmed the Superior Court's decision. *Reybold Grp. v. Pub. Serv. Comm'n*, 956 A.2d 643, 643 (Del. 2008) (table).

Pursuant to Regulation 3.8.9, the Commission reopened Docket 15 two years after the new Regulations took effect "to review the extension methodology and to assess its effectiveness, and the CIAC computation and costs categories." 26 Del. Admin. C. § 3.8.9; *see* PSC Order No. 7375 ¶ 1 (Apr. 8, 2008) (reopening Docket 15). After public proceedings in which Staff and DPA solicited information and comments from the Class A water utilities, the Commission concluded at that time that no revisions to the Regulations were necessary. PSC Order No. 7621 ¶ 1 (Aug. 4, 2009). Emblem's Complaint in this proceeding is the first formal challenge to a CIAC assessment since the Regulations were adopted a decade ago. Tr. 541:22-542:14.

B. The CIAC Regulations Make Assessment Of CIAC To
Developers Mandatory Where The Costs Of Installing Off-
Site Facilities Are Directly Assignable To A Project.

Through Docket 15, the Commission determined that in "order to curb the utilities' ability to under-charge for CIAC, Staff drafted amendments to the current regulation

that standardize the determination of CIAC for Class A utilities and that **require** cost-based contributions from builders or developers.” PSC Order No. 6814 at Ex. A ¶ 48 (emphasis added). The Docket 15 hearing examiner recommended that objections from certain homebuilders and developers be rejected and that Staff’s proposed regulations be adopted because they were “just and reasonable.” *Id.* at Ex. A ¶ 51. The Commission twice adopted the hearing examiner’s recommendations. *Id.* ¶ 2; PSC Order No. 6873 ¶ 1. The crux of this new paradigm is stated in the resulting Regulations as follows:

A utility **shall require CIAC** for Facilities Extensions to the extent provided in §§ 3.8.1 and 3.8.2 herein below.

Title 26 Del. Admin. C. § 3.8 (emphasis added). The Regulations define CIAC as cash, services, funds, property or other value “for the purpose of constructing or aiding in the construction of utility plant and which represent a permanent infusion of capital from sources other than utility bondholders or stockholders.” Title 26 Del. Admin. C. § 1.3.12. They define “Facilities Extension” as follows:

“Facilities Extension” means the extension of the water utility’s Mains and appurtenances (“Facilities”) for the provision of water service. As used in this definition, “appurtenances” include valves, hydrants, pumps, sampling equipment and other miscellaneous items appurtenant to a Main extension.

Id. § 1.3.14. That definition is then a key aspect of the Regulation that mandates when Delaware water utilities must assess a CIAC charge to developers:

3.8.1 CIAC **Requirement** For Facilities Extensions

A utility **shall require a CIAC** when the request for a Facilities Extension will require the installation of pipe and/or associated utility plant. **All charges henceforth to contractors, builders, developers**, municipalities, homeowners, or other project sponsors, **seeking the construction of water Facilities from a water utility**

company shall be in the form of a CIAC to be paid to the water utility as Category 1A, 1B and Category 2 costs, as computed under §§ 3.8.2 and 3.8.6, subject to true-up under § 3.8.8.

Id. § 3.8.1 (emphasis added).

Regulation 3.8.2 establishes how to compute CIAC charges for three delineated categories of CIAC costs. Category 1 Costs (of which there are two types) are costs that are “directly assignable” to the specific new development, while Category 2 costs are those that are not directly assignable to the new development. PSC Order No. 6814 at Ex. A pp.5-6; Title 26 Del. Admin. C. § 3.8.2. Category 1A Costs encompass all directly assignable on-site Facilities costs, with “on-site” defined as from the furthest point of the project site up to a point 100 feet beyond the boundary of the project. Title 26 Del. Admin. C. § 3.8.2. Category 1B Costs encompass all directly assignable off-site Facilities costs from 100 feet beyond the boundary of the project to the utility’s existing Main. *Id.* Category 2 Costs, conversely, are indirect transmission, supply, treatment and other utility plant costs that are not captured by Category 1A and 1B Costs, and are assessed at a flat rate regardless of the actual amount of the pertinent costs that are not directly assignable to the new development. *Id.*; PSC Order No. 6814 at Ex. A ¶¶ 65-66. Category 1B Costs, which is the type of CIAC charge at issue in this proceeding, is defined in full as follows:

Category 1B Costs

All off-site Facilities costs that are directly assignable to a specific project from such point 100 feet beyond the boundary of the project and continuing to the utility’s existing Main are Category 1B Costs and shall be designated by the utility and funded by the contractor, builder, developer, municipality, homeowner, or other project sponsor, as a CIAC not subject to refund. These costs include such items as Mains, hydrants, treatment plants, wells, pump stations, storage facilities, and shall include any other items that are necessary for the provision of utility water service. Notwithstanding the foregoing, Category 1B Costs shall not

include, and the utility shall be entitled to pay for and include in its rate base, any additional Facilities costs elected to be incurred by the utility in connection with the Facilities Extension for company betterment. In determining whether Category 1B Costs are directly assignable to a project, or elected as company betterment, the CIAC shall be calculated based on the cost of installing Mains using a minimum of 8 inch diameter pipe, *provided, however*, that where Mains of a larger diameter are required by applicable laws, building or fire codes, or engineering standards to provide water service to the project on a stand-alone basis, the CIAC shall be calculated based on the cost of installing Mains using such larger diameter pipe.

Title 26 Del. Admin. C. § 3.8.2. In short, if Artesian installs Facilities within the scope of § 3.8.2, it **must** assess CIAC or Artesian would violate the Regulations.

C. The Off-Site Facilities Costs For Which Artesian Has Demanded CIAC From Emblem Are “Directly Assignable” To Emblem’s Development, So CIAC Is Mandatory.

Since the current Regulations took effect in 2006, Artesian has assessed CIAC when the developer is ready to start construction, because that is when the CIAC costs (if any) are determinable. Tr. 300:12-21. Moreover, it is appropriate to wait until construction begins to inform developers that CIAC must be paid because of the way proposed developments change and are delayed. Tr. 153:3-156:13. In this case, Fashion Center was delayed for more than a decade and a smaller development is being built than was originally planned. Ex. 17 (WCC requested in 2002, given in 2010); Ex. 39 (connected to Artesian’s system in February 2014); Tr. 155:13-21 (development plan changed). Emblem’s development was originally going to be townhomes rather than the apartments that are being built (Tr. 154:16-21) and it waited nearly five years to start construction after it had an approved plan. Market Place has not communicated with Artesian about its development for more than three years, since receiving a WCC. Tr. 282:3-9. As importantly, the ability of Artesian’s system to meet customers’ water needs changes with each new development that joins the system. Tr. 70:5-71:6. As a practical

engineering matter, Artesian cannot guarantee in every case that a CIAC payment will or will not be necessary until a particular development is ready to construct because of the way circumstances change. Tr. 71:7-21; *id.* 256:7-257:16.

The 273 Main falls within the scope of § 3.8.2, so Artesian must assess a CIAC charge to Emblem and Emblem must pay that charge. During 2013, three developments at the Christiana Mall – Cabela’s, Cinemark and Fashion Center – prepared for construction. Artesian determined that, as a consequence, the water system in the area of Emblem’s development was too stressed and restricted in capacity, both with respect to fire flow and ability to serve water in general. Tr. 79:10-20. Accordingly, Artesian developed a plan to bring water up Old Route 7 from Route 273 to Emblem’s development (the 273 Main) and to install a booster station in the area to force water from the lower service tier in the area of Route 273 to the higher service area around the Mall.⁴ Ex. 107 at EA000146-47. Artesian ascribed all of the estimated cost of the 273 Main to the five anticipated developments at the Mall because it was necessary to provide them with adequate water flows at appropriate pressures. In short, Emblem and the other developers were the cost causers for the installation of the 273 Main. Tr. 262:13-23. On the other hand, Artesian recognized that both current customers and the five new developments would benefit from the booster station. Ex. 78 at EMB-DR3-005 to 06. Based upon an

⁴ Artesian could have installed plant in many places if the only goal was to provide additional reliability at the Mall and north of I-95, but chose to build the 273 Main specifically to ensure adequate service to Emblem, because the western side of the Mall was isolated from the looping at the Mall. Tr. 54:6-16. Moreover, running a main up Old Route 7 was not a preferred option, because that was another water utility’s service area and would not result in any additional customers for Artesian. Tr. 58:1-15. The second main connecting the Mall area to Churchmans Road was not completed by the end of the Test Period in Artesian’s last rate proceeding. Tr. 140:20-141:15. It has since been completed.

engineering analysis, Artesian estimated that the new developments should pay one-half of the cost of installing the booster station. Tr. 143:15-144:10.

Artesian used the new developments' projected water consumption as the basis for allocating the portion of the CIAC charge that each developer should pay. Ex. 87; Tr. 151:23-153:2. Artesian used industry benchmarks to determine each project's anticipated consumption, for example using the number of theater seats to determine the anticipated water use at Cinemark's movie theater. Ex. 82; *see also* Tr. 173:8-174:3. The aggregate of the five projects' consumption equaled 100% of the projected new consumption; each party's portion of that consumption then corresponded to the portion of the CIAC charge that each developer would be asked to pay. Ex. 87. To Artesian's knowledge, this is the most equitable means of allocating CIAC among several cost-causers. Tr. 157:24-158:9; *id.* 173:8-174:21. Staff's expert agrees that using industry benchmarks as the means of estimating consumption, then allocating CIAC among the new developments that require the plant according to their comparative projected consumption is the appropriate way to allocate CIAC among several parties. Tr. 640:1-13. Here, Emblem is only being asked to pay approximately one-third of the cost of the 273 Main and none of the expense of the new booster station.

The Regulation defining Category 1B Costs states in relevant part:

All off-site Facilities costs that are directly assignable to a specific project from such point 100 feet beyond the boundary of the project and continuing to the utility's existing Main are Category 1B Costs and shall be designated by the utility and funded by the contractor, builder, developer, municipality, homeowner, or other project sponsor, as a CIAC not subject to refund. These costs include such items as Mains In determining whether Category 1B Costs are directly assignable to a project, or elected as company betterment, the CIAC shall be calculated based on the cost of installing Mains using a minimum of 8 inch diameter pipe, *provided, however*, that where Mains of a larger diameter are

required by applicable laws, building or fire codes, or engineering standards to provide water service to the project on a stand-alone basis, the CIAC shall be calculated based on the cost of installing Mains using such larger diameter pipe.

Title 26 Del. Admin. C. § 3.8.2.

After this dispute arose, Artesian assessed the least expensive means of providing water service to Emblem on a stand-alone basis to determine whether the amount of CIAC required could be lessened. Tr. 80:23-82:19. Specifically, Artesian examined whether water service could be provided to Emblem without the assistance of the new booster station, and if so, what size line was necessary. Tr. 81:2-20. The analysis was accomplished by using Artesian's WaterGEMS modeling system, which is accepted internationally in the water utility industry as reliable. Tr. 80:1-9. The analysis determined with certainty that the only size main that could provide adequate fire flow protection to Emblem's development without a booster station⁵ was a 16 inch main, which is the size main of the 273 Main. Tr. 81:13-83:12; Ex. 58.⁶ Emblem made no attempt at the evidentiary hearing to contest, or even question, this determination by Artesian's engineers. Because applicable laws, building and fire codes, and engineering standards required, as a matter of undisputed engineering, a 16 inch main pipe to provide water

⁵ Artesian initially demanded a CIAC payment from Emblem for costs relating to the booster station as well. Artesian determined that charging Emblem its portion of the cost of a 16 inch main (which was barely feasible) with no booster station would be cheaper than assessing Emblem a percentage of the booster station and an 8 inch main. Tr. 182:13-183:19. It should be noted, for purposes of future CIAC disputes, that calculating the least cost to provide service to Emblem as part of an effort to amicably resolve this dispute does not mean that Artesian could not have charged it for the cost of the booster station as well. When Artesian installs plant, it considers factors such as anticipating peak day use, which the lowest cost-effective calculation for Emblem in this proceeding does not reflect. Tr. 188:18-190:15.

⁶ Providing water to Emblem using a booster station and a smaller main would cost more than using a 16 inch main and no booster station. Tr. 185:24-186:12.

service to Emblem's project on a stand-alone basis, a portion of the cost of the 273 Main is directly attributable to Emblem. Tr. 559:18-560:6. Unless and until that 16 inch main was installed, Artesian could not provide fire protection service to Emblem's development at the mandated flows, making it a cost-causer for the main.

D. Summary.

By the time Emblem was ready to build in 2015, Artesian could only provide water service to it if a 16 inch main was installed to ensure adequate fire flows. That makes the cost of the 273 Main directly attributable to Emblem's development within the meaning of Regulation 3.8.2's definition of Category 1B Costs. Therefore, it was mandatory that Artesian assess Emblem CIAC pursuant to Regulations 3.8 and 3.8.1. As this was a situation where several developers drove the need for installing facilities, Artesian allocated the expense equitably based upon objective, industry accepted benchmarks that project the comparative water consumption at each project. The result is Emblem paying approximately one-third of the cost of the 273 Main and none of the cost of the new booster station. This satisfies the burden imposed by 26 Del. C. § 307(a) that the charge be "just and reasonable."

III. ALL OF EMBLEM'S ARGUMENTS AS TO WHY IT SHOULD NOT PAY CIAC FAIL.

As explained above, the Regulations required the assessment and payment of CIAC for the 273 Main. Emblem nevertheless offers a laundry list of arguments and excuses in an attempt to avoid paying CIAC. As explained below, Emblem's contentions fail and the Commission should require Emblem to pay the CIAC charge.

A. Emblem's Attempt To Use New Castle County's Unified Development Code And Artesian's Water Capacity Certification To Avoid Paying CIAC Is Fundamentally Flawed.

Emblem's arguments are, in large part, the product of its fundamental misunderstanding of the law and facts relating to New Castle County's Unified Development Code ("UDC") and the Water Capacity Certification ("WCC") that the UDC requires as a precondition to approval of proposed development plans.⁷ Emblem's claims are based in large part on Emblem's fallacious belief that the WCC that Artesian gave to Emblem in 2010 prohibited Artesian from later seeking CIAC. Tr. 331:9-14; *id.* 369:14-19. Emblem contends that New Castle County has established the delivery of a WCC as the time by which a utility must demand CIAC, if ever. Tr. 353:17-354:7. Emblem's erroneous theory appears to be as follows:

- The WCC requires the water utility to certify as of the moment the WCC is given to the developer that it has sufficient capacity, including sufficient lines

⁷ The Hearing Examiner in this proceeding has already ruled, without objection from any party, that Artesian's witnesses C. Thomas deLorimier and David B. Spacht qualify, respectively, as experts on the subjects of: (i) the design and operation of public water distribution systems; and (ii) the financial and regulatory aspects of CIAC in Delaware. Tr. 52:10-23; 126:18-127:6. Similarly, Staff's witness Connie S. McDowell has been qualified in this proceeding, without objection, as an expert regarding the rate-making process, as well as Docket 15 and Delaware's CIAC regulations. Tr. 537:1-14. Conversely, to allow for the efficient taking of evidence without the need to voir dire or to challenge every opinion offered as potentially being outside the expertise of Emblem's proffered expert Ted C. Williams, the parties agreed to address his qualifications in briefing. Tr. 396:16-398:3. Emblem offered Mr. Williams as an expert in "Civil Engineering and land use and land development plans." Tr. 401:1-9. Mr. Williams himself, however, testified that he is **not** an expert on CIAC, the Commission's CIAC Regulations, Docket 15, water utilities or the regulation of water utilities. Tr. 447:8-18; *id.* 448:22-450:6. Accordingly, where Mr. Williams' testimony on any of those latter topics is contradicted by the expert testimonies of Messrs. deLorimier and Spacht or Ms. McDowell, Mr. Williams' testimony should be given little or no weight for purposes of determining the facts or law.

and other infrastructure, to supply water to the new development in accordance with specific service standards, such as Minimum Service Pressure of 25 psi (*see* Exs. 114, 115);

- Item 7 of the WCC, titled “Supply Capacity,” states in part that if “the capacity of the existing water supply is inadequate to serve the demands of existing and future customers,” the utility must “describe the plans to provide additional water supplies” (*see* Ex. 114 at Section 40.05.310);
- When Artesian gave the WCC marked as Exhibit 1 to Emblem in 2010, Artesian did not indicate that it had inadequate water supply and did not describe any plans to provide additional water supplies. This, from Emblem’s perspective, was because there was already a water main in front of Emblem’s property, to which it would connect for water service (*see, e.g.,* Ex. 112 at 5:1-8); and
- Because there was already a water main through which Emblem’s development could receive water service and Artesian did not indicate that it was insufficient capacity to serve Emblem’s property (evidenced by Artesian’s failure to describe plans to provide additional water supply), any change in the existing system’s ability to provide water service to Emblem is a consequence of the conduct of other developers who sought a WCC after Emblem received one, and those others should pay any CIAC associated with the new Facilities that Artesian subsequently installed (*see, e.g.,* Ex. 112 at 12:8-23).

Emblem’s theory, and in fact Emblem’s assumption that New Castle County’s WCC is even pertinent to CIAC charges, is fatally flawed for the following reasons:

1. New Castle County does not have, and never has had, any authority to regulate, impact or control CIAC charges. Tr. 164:4-10; *id.* 204:14-20; *id.* at 352:21-353:2. That has always been the Commission’s exclusive purview as the body statutorily charged with regulating Delaware utilities. 26 Del. C. § 201(a). New Castle County cannot, of course, establish the date by which a utility must demand CIAC from a developer (according to Emblem,

the date on which the utility provides a WCC).⁸ Tr. 331:9-14. Delaware’s legislature gave “exclusive original supervision and regulation of all public utilities” to the Commission. 26 Del. C. § 201(a). Moreover, accepting Emblem’s theory leads to the irrational result that the application of the Commission’s CIAC Regulations varies depending on the county in which the development is to occur. As Emblem admits, Kent and Sussex Counties do not use forms similar to New Castle County’s WCC. Tr. 349:5-350:15; *see id.* 163:14-164:3; 559:9-12. Unsurprisingly, the terms “Contributions-In-Aid-Of-Construction” and “CIAC” do not appear anywhere in New Castle County’s UDC. Tr. 204:11-20. Emblem’s assumption that New Castle County’s UDC or WCC form has any impact on assessment or payment of CIAC is wrong as a matter of law. *Id.*; Tr. 558:21-559:12.

2. As the President and Co-Managing Partner of Emblem’s parent entity testified, prior to the Evidentiary Hearing in this proceeding, Emblem misunderstood certain of the terms of art reflected in the WCC. Tr. 335:15-336:6. Specifically, statements in Emblem’s pre-filed testimony demonstrate that Emblem mistakenly believed that the term “supply capacity” was equivalent to the totality of Artesian’s ability to supply water at the development, including the existence of all necessary lines, storage and other distribution facilities. *See, e.g.*, Ex. 112 at 5:3-8 (stating “Artesian certified that there were no plans to provide additional water **supplies**, which the County requires a utility to provide if the capacity of the utility’s existing water **supply** is inadequate to serve the demands of existing customers and future customers in the area. Presumably, Artesian provided no such plans **because a water main already existed**

⁸ Nothing in the record indicates or implies that New Castle County ever intended the UDC to have any bearing on CIAC.

along the road frontage of Emblem at Christiana, with the proposed water service for the project connecting to that existing water main” (emphasis added)). As the Commission knows, however, water “supply” is unrelated to infrastructure: “supply” is the water itself. Tr. 164:11-166:4; 277:8-18. This perhaps should have been clear to Emblem from Item 7 on New Castle County’s WCC, which refers to droughts, the quantity of supply available from groundwater sources through Delaware Department of Natural Resources and Environmental Control (“DNREC”) allocations, and imported water. *See* Ex. 114 at Section 40.05.310. Regardless, Emblem’s contention that Artesian certified that every piece of infrastructure necessary to deliver water to Emblem existed as of the day it provided a WCC, because Artesian did not describe plans to provide additional “supply,” is simply wrong. Moreover, the undisputed evidence establishes that Artesian has always, from the day it provided a WCC to Emblem in 2010 through the present, had *excess* water *supply*. Tr. 166:22-168:1. Accordingly, the WCC that Artesian gave to Emblem was accurate and Artesian had no reason to describe plans to provide additional water supply.

3. Emblem also misapprehends the purpose of the WCC form. Emblem incorrectly argues that the WCC controls any CIAC determination (which is not a function that New Castle County regulates). The true and obvious purpose of the WCC from a land planning perspective is to ensure that if the County approves a development, there will actually be water capacity to serve it. Tr. 160:23-163:13. New Castle County’s adoption of its WCC form was a response to a period when development in the County outstripped the ability of Delaware’s water utilities to provide water, resulting in shortages. Tr. 191:17-193:21. To ensure that development occurred in a responsible manner, the County began requiring certifications from utilities stating that adequate supply existed or the proposed development would be rejected. *Id.*; *id.* 195:12-16.

4. As importantly, Emblem should have known that the WCC that Artesian gave it was not a certification that all necessary infrastructure already existed to deliver water service to its development. UDC Section 40.12.115, concerning “Water Service”, specifically provides that “**On-site testing** shall be used as the basis for determining the capacities in lines, pumps, storage and distribution facilities” (which correspond to Items 3-6 on the WCC – *see* Ex. 114 at Section 40.05.310). Ex. 115 at Section 40.12.210 (emphasis added). In Emblem’s case, it *knew* when Artesian provided the WCC in 2010 that there was no on-site system in place through which such testing could occur (Tr. 339:2-340:8), because Emblem planned to build the on-site system itself. Ex. 112 at 12:1-3; Tr. 202:11-203:5. Emblem admits it was precluded from constructing that system until it had a builder’s permit, it could not obtain a builder’s permit until it had an approved final plan, and it could not get final approval of its plan until it had a WCC from Artesian. Tr. 334:16-335:13. Accordingly, Emblem knew that Artesian could not certify that an adequate system was fully installed at the beginning of the development approval process. Tr. 333:8-334:15; *id.* 339:2-23.⁹

Relatedly, Emblem fails to acknowledge what Artesian actually certified on the WCC. Pursuant to New Castle County’s mandatory certification language (*see* Ex. 114 at Section 40.05.310, Item 9, “Certification”), Artesian’s engineer certified “I have analyzed the area using and find that the standards in 3, 4, 5, 6 & 7 **will** be met **after** this development and any others approved in the area of influence are **fully developed and occupied.**” Ex. 1 (emphasis

⁹ Emblem claims without evidentiary support that testing system capacity near the development satisfies the UDC (Tr. 341:23-343:3), even though on-site testing is possible if it occurs after construction, but before an occupancy permit issues, as the UDC facially requires. Ex. 115 at Division 40.12.210 & Section 40.12.330.

added). The clear statement that the conditions listed in Items 3 through 7 will be met in the future refutes Emblem's contention that Artesian certified in 2010 that all infrastructure necessary to serve Emblem already existed. Tr. 403:15-404:7. As of the date of the Evidentiary Hearing, Emblem's development was neither fully built nor occupied, and Market Place (which also will be required to pay CIAC for the 273 Main) had not started construction. Tr. 281:17-282:9. Accordingly, the time for Artesian to comply with its certification by meeting the standards set forth in Items 3 through 7 of the WCC has not even occurred yet.

5. Emblem makes a related, mistaken argument that, by receiving a WCC from Artesian, it had reserved a "place in line" for using Artesian's water service. Emblem's theory is that if it became necessary to install Facilities Extensions to provide water service after Emblem received its WCC, the parties that sought a WCC after Emblem must pay the CIAC for that installation. Ex. 111 at 5:13-16. This argument is wrong for several reasons. First, as explained above, the WCC has no connection to or bearing upon CIAC charges. Second, the UDC's statement that new developments may use water capacity on a first come, first served basis relates to the County's concern that there may be insufficient water to serve all proposed developments, not an attempt to make developers purportedly immune to CIAC charges as Emblem claims. Tr. 548:7-549:4. Third, receiving a WCC from Artesian does not equate to Emblem "using" Artesian's water. Having the WCC did not make Emblem Artesian's customer and Emblem was in fact prohibited from connecting to Artesian's system and using water until it signed a water service agreement and received Artesian's permission to do so – which did not happen until January 2016. Tr. 347:14-348:3; Ex. 68. Meanwhile, other developers at the Mall who asked for WCCs after Emblem – Cabela's, Cinemark, and the Fashion Center – started construction more quickly, with the result that Emblem started to use Artesian's water after

them. *See* Exs. 34, 39, 68. Each of the foregoing Mall developers paid CIAC to Artesian for the 273 Main. Exs. 34, 40. Ironically, therefore, even applying Emblem's faulty logic of "first come, first served", it would still be required to pay CIAC.

In summary, all of Emblem's contentions that it need not pay CIAC because Artesian gave it a New Castle County WCC in 2010 fail as a matter of law and fact. Emblem's meritless claims in this proceeding are in large measure the product of Emblem's misunderstanding of the nature, relevance and meaning of New Castle County's WCC form. As will be explained below, these errors permeate virtually all of Emblem's arguments.

B. The 273 Main CIAC Is "Directly Assignable" To Emblem.

In an attempt to avoid paying its share of the 273 Main, Emblem denies that it is "directly assignable" to its development within the meaning of Regulation 3.8.2's definition of Category 1B Costs. Ex. 112 at 7:3-4. Emblem's specific theory is that, because a 12 inch main existed outside its property in 2010 when Artesian gave it a WCC, and at that time the 12 inch main could have provided water to Emblem's development, any subsequent changes in Artesian's ability to deliver water service is the responsibility of other developers who obtained WCCs after Emblem. Ex. 112 at 6:20-7:4; *id.* at 15:9-12; Tr. 408:22-409:20. As explained above in Section II.C, the charge is directly assignable to Emblem. Emblem's theory is built upon mistaken assumptions.

As previously explained, New Castle County's UDC and WCC form are unrelated to CIAC. New Castle County does not have the power to set the date or event by which a water utility must demand CIAC (Tr. 164:4-10), and therefore Artesian was not required to demand a CIAC payment before providing a WCC as Emblem claims (Tr. 353:17-354:7). Even the Commission's CIAC Regulations do not set a point in time by which utilities must notify the

developer that CIAC will be required (Tr. 547:12-17; *id.* 652:6-10), and instead merely mandate that CIAC must be assessed if the terms of Regulations 3.8.1 and 3.8.2 are met. Tr. 300:12-301:14. Accordingly, it is irrelevant that Emblem would not have been charged Category 1B Costs if it had built promptly after receiving its WCC in 2010, because adequate infrastructure existed to service Emblem at that time. Artesian acknowledges that if Emblem had built them, it would not have paid Category 1B Costs (but would still have paid Category 1A and Category 2 Costs). Tr. 72:7-20; *id.* 110:16-23. If it had built in 2010, Emblem would have already been Artesian's customer when the other developers at the Mall came forward with new projects. By delaying construction, Emblem accepted the risk that conditions might change, particularly in an area where development started occurring rapidly. Tr. 110:9-15; *id.* 110:24-111:7. The consequence of accepting Emblem's theory that utilities must demand CIAC before providing a WCC is that the risk that additional infrastructure may become necessary would shift from developers to the utilities and their existing customers. Tr. 627:15-21. That is the opposite of the policy established by the Commission through Docket 15, where it was decided developers must pay the cost of obtaining water service for a new development, including with respect to off-site infrastructure. Tr. 134:4-138:18. If a developer has not started construction (which equates to becoming Artesian's customer and actually using water) and it becomes necessary to install additional facilities to provide water service, the Regulations require CIAC from the developer. Regulation 3.8.1.

Similarly, Emblem mistakenly relies upon the UDC's statement that new development "may use water capacity on a first come first serve basis" to claim that it has priority over developers who asked for WCCs after Emblem did. Ex. 115 at Division 40.12.000 (quoted language); Ex. 111 at 5:13-16 (claiming Emblem had priority over later developers); Ex.

112 at 6:8-16 (claiming Emblem had priority over later developers). This contention again fails because the UDC is unrelated to CIAC and New Castle County does not have the authority to impact how the Commission's CIAC Regulations are applied (as even Emblem concedes). Tr. 352:21-353:2. It is interesting, however, that even if the UDC could make developers who use Artesian's water first immune from CIAC charges as Emblem claims, which it cannot, it is an established fact that Emblem used Artesian's water – actually connected to a main and started using water – after Cabela's, Cinemark and the Fashion Center. Tr. 213:5-20; *see also* Exs. 34, 39, 68. Therefore, even if Emblem's faulty logic was correct (which it is not), Emblem would still be required to pay CIAC for the 273 Main.

Emblem makes a related argument that installation of the 273 Main was for the purpose of improving "reliability" to Artesian's system, and therefore cannot be recovered as Category 1B Costs as defined in Regulation 3.8.2. Tr. 90:17-94:7. Emblem specifically points to a portion of Staff's pre-filed testimony where Ms. McDowell notes that Artesian did not assess the full cost of the 273 Main to developers (which was modestly more than the estimated cost) because there was some reliability benefit to current customers. Ex. 113 at 4:27-5:3. *See* Tr. 59:3-60:2 (discussing "looping"). At the evidentiary hearing, Emblem asked Artesian's witness Mr. deLorimier and Emblem's witness Mr. Williams questions that assumed "reliability" is automatically prohibited from being assessed as Category 1B Costs, suggesting Staff itself had testified that reliability installations cannot be recovered through CIAC. Tr. 90:14-93:17; *id.* 410:11-412:12. This ignores Staff's testimony (which was not brought to the attention of Mr. deLorimier or Mr. Williams) that Staff believes the cost of the 273 Main qualifies as CIAC. Ex. 113 at 4:1-20. If Emblem wanted an explanation of how plant that improves reliability could also qualify as CIAC within the meaning of Regulation 3.8.2, the proper person to ask would

have been Ms. McDowell, not others. Regardless, Artesian answered how an installation can be both.

Improving inadequate fire flows at the Mall arguably constitutes improving “reliability” in that area. What is important here, though, is that it was the new developments that reduced the pressures and flows, making service unreliable. Tr. 92:18-93:17; *id.* 265:23-267:8. That makes the Facilities necessary to deliver adequate fire flows directly attributable to the new developments. *Id.* Emblem accepts this proposition, but claims it was immune from contributing to CIAC because Artesian purportedly certified in 2010, before other developers at the Mall obtained WCCs, that no additional plant would be necessary to serve Emblem. Tr. 411:23-412:8; Ex. 112 at 12:7-23. As previously explained, Emblem is wrong that the WCC had any bearing on CIAC, and the existence of plant at the time of providing a WCC has no bearing on whether CIAC must be paid because additional plant is necessary when the developer is ready to build. Tr. 265:23-267:8. Emblem was one of the five new projects that reduced water pressures and flows, necessitating the installation of new facilities, so it must under Regulation 3.8.2 pay its share of those directly attributable costs.

Because Artesian had to install the 273 Main with a 16 inch diameter to ensure adequate fire flow protection at Emblem’s development, the main is “directly assignable” to Emblem and the payment of CIAC is mandatory under Regulation 3.8.2. Emblem’s contention that none of the 273 Main expense is directly attributable to its development is refuted by the unchallenged calculations from Artesian’s engineering department that installation of the 273 Main was necessary to meet mandatory fire flow standards. Ex. 58. Emblem admits that it does not have evidence to refute Artesian’s calculations. Tr. 376:10-17.

C. Emblem Mistakenly Argues That Artesian Cannot Collect CIAC After Facilities Have Been Installed.

Regulation 3.8.9.1 provides that the CIAC Regulations are to apply “prospectively” as follows:

3.8.9.1 The regulations governing CIAC and Advances shall:

3.8.9.1.1 apply only to Class A Water Utilities, and

3.8.9.1.2 apply prospectively and therefore shall not affect or apply to circumstances where the water utility has already entered into a water service agreement with the contractor, builder, developer, municipality, homeowner, or other person, regarding the construction of water facilities.

Id. Emblem tortures the plain meaning of this provision and takes certain other terms in the Regulations out of context, arguing that the Regulations require water utilities to collect CIAC before installing plant. Ex. 111 10:12-23. Emblem is wrong.

The plain meaning of Regulation 3.8.9.1.2 is that the new CIAC regulations would not disturb preexisting contracts, and instead would only apply to arrangements for development that were made after the adoption of the CIAC Regulations. Tr. 246:4-248:22; *id.* 543:1-544:22. The use of the word “prospectively” in the statute does not mean that utilities must demand CIAC before installing plant as Emblem claims. Tr. 248:23-249:5; *id.* 544:23-545-2. Similarly, the cherry-picked terms that Emblem cites do not mandate the collection of CIAC before installing plant. To the contrary, all Category 2 Costs within the meaning of Regulation 3.8.2 are by their very nature CIAC payments *after* infrastructure has been built. Tr. 135:20-137:2. Category 2 Costs apply where someone adds a new connection to the existing utility system, and therefore benefits from the investments that existing customers previously made in infrastructure. *Id.* The Commission determined that the subsequent customers should contribute

CIAC at a flat rate as compensation for the amount of excess capacity that the system loses. *Id.* Emblem itself has previously paid Category 2 Costs (although it did not understand that fact until after discovery in this proceeding – Tr. 325:10-326:8) when it began receiving water service at some of its properties, paying after-the-fact for infrastructure that was already in place. Tr. 328:6-13.

Even with respect to Category 1A and 1B CIAC charges, the experts from Artesian and Staff testified that it is common to collect CIAC charges after plant has been built. Tr. 248:23-249:5; *id.* 544:23-545-2. Artesian produced an entire list of developments that, once they proceed with construction, will be required to pay CIAC for plant that is already in service. Ex. 44; Tr. 250:22-256:6. Similarly, the undisputed testimony is that Market Place will be required to pay its portion of the 273 Main and booster station if and when construction starts, even though those facilities are now in use serving other customers. Tr. 281:17-282:13. The circumstances at the Mall demonstrate why such flexibility makes sense. For the development at the Mall since 2013, Artesian needed to assess CIAC to four different developers in connection with five different projects, each of which was proceeding on a different time line to construction. If Artesian needed to collect CIAC from all of the developers before it could install the plant that all of them needed, one developer could delay the others' projects by failing to pay. Tr. 472:9-473:6. Alternatively, one developer could claim in response to the CIAC charge that it had decided not to build, and therefore refuse to pay. If the other developers then paid for the infrastructure, the non-paying developer might change position again and ask for water service without a Category 1B CIAC charge. Such conduct would violate the policy established by the Commission's Regulations that the causers of infrastructure costs should bear the expense. Tr. 137:11-138:18; *id.* 150:6-151:22.

The only contrary evidence from Emblem's inexpert witnesses was that they had never previously experienced CIAC being required after plant had been installed. Ex. 111 10:12-23; Ex. 112 7:19-18:14; Tr. 318:9-319:2. That is refuted by Artesian's expert testimony that CIAC is routinely collected after new plant has been installed. Tr. 250:22-256:6. Similarly, Emblem's statutory construction argument fails. For example, the Regulations' definition of CIAC as being "for the purpose of constructing or aiding in the construction of utility plant" does not, as a matter of infallible logic, mean that the payment must be paid before the utility plant is constructed. Regulation 1.3.12. If the payment is made after construction, the payment still constitutes funds that have been used for the purpose of aiding in the construction of utility plant and which represent a permanent infusion of capital from sources other than utility bondholders or stockholders. *Id.* Similarly, the fact that the Regulations include a true-up provision which allows for the assessment of CIAC based upon an "estimated amount of the CIAC" does not prohibit the utility from installing plant first and assessing CIAC based upon the actual cost. Regulation 3.8.8. There simply is no provision of the Regulations that mandates that CIAC must be collected before plant is installed and, if one accepted Emblem's interpretation of the Regulations, the mandates of Docket 15 and the Regulations would be frustrated in this case. *See* Regulation 3.8 (which states that a "utility shall require CIAC for Facilities Extensions to the extent provided in §§ 3.8.1 and 3.8.2 herein below."), Regulation 3.8.1 (which requires that a "utility shall require CIAC when the request for a Facilities Extension will require the installation of pipe and/or associated utility plant."), and Regulation 3.8.2 (which provides that "All off-site Facilities costs that are directly assignable to a specific project from such point 100 feet beyond the boundary of the project and continuing to the utility's existing Main are Category 1B Costs and shall be designated by the utility and funded by the contractor, builder,

developer, municipality, homeowner, or other project sponsor, as a CIAC not subject to refund.”). The Regulations do not require utilities to collect CIAC before installing plant as Emblem claims, and do require that CIAC must be assessed where, as here, the cost of installing Facilities is directly attributable to a specific project. Accordingly, Emblem’s theory that CIAC must be collected before plant is installed must be rejected.

D. Artesian Cannot Double Recover The Cost Of The 273 Main Through Rates And CIAC As Emblem Claims.

Emblem claims that Artesian is seeking double-recovery of the cost of the 273 Main by including it in rates and seeking a redundant CIAC payment from Emblem. Compl. ¶¶ 19, 34, 42-45. The evidence shows that Emblem does not understand how accounting for rate base works and Emblem is indisputably wrong.

As an initial matter, Artesian was required, in its last rate case, to present its financial affairs as of the end of the Test Period. At that point in time, the 273 Main and new booster station were used and useful. Artesian had received CIAC payments from three of the new projects at the Mall relating to that expense, but had not received CIAC payments yet from Emblem or Market Place. Accordingly, the remaining expense for those facilities was included in rates. The Commission accepted this state of affairs when setting rate base and Artesian’s current rates.

As was explained in detail by Mr. Spacht (who has been qualified as an expert on the financial and regulatory aspects of CIAC) through the use of T account demonstratives, Artesian cannot double recover the cost of this expense. Tr. 233:24-238:15; Ex. 129. If the 273 Main was merely another plant asset in rate base, the cost would be recovered in rates through annual depreciation expense over the useful life of the main. Tr. 234:17-24. For the period that

the 273 Main is included in rates, the depreciation expense recovered each year is accumulated as a contra-debit account reducing the investment in the asset, which also reduces Artesian's rate base on which it may earn in ensuing fiscal years. Tr. 235:1-16; *id.* 238:4-15. Now, however, Artesian has received the CIAC payment from Emblem. Ex. 69. The CIAC payment, representing the gross original cost of the investment made by Artesian before depreciation was paid by customers through rates, is recorded to a liability account that offsets the original investment in utility plant before accumulated depreciation, and thus reduces rate base associated with the asset to zero. Tr. 235:22-236:7. The receipt of Emblem's portion of the 273 Main cost reduces rate base by that full amount, encompassing not only the portion of the cost that remains in rates because it has not yet been paid by customers as depreciation expense, but also the amount of depreciation expense that customers paid in the years prior to Emblem's CIAC payment. Tr. 236:8-237:13. The reduction of rate base by both amounts means the Company cannot earn a return on the additional revenues previously received from customers as a repayment of the utility plant investment. Tr. 237:21-238:3. Notably, it does not matter how many years lapse between the inclusion of some 273 Main expense in rate base and the receipt of CIAC – Delaware's regulatory construct of rate base and customer rates prohibit double recovery as proffered by Emblem. Tr. 235:20-21; *id.* 237:15-238:15. Emblem is simply incorrect when it claims that Artesian seeks double recovery of the 273 Main expense.

E. The Commission Should Reject Emblem's Argument That,
 Even If Emblem Is Required To Pay CIAC For The Plant
 At Issue, It Should Pay Less Than Artesian Has Demanded.

For a variety reasons, Emblem contends that even if it is required to pay CIAC in this proceeding, it should be required to pay less than Artesian demanded. All of Emblem's

arguments should be rejected, and the Commission should endorse the amount of CIAC that Artesian required from Emblem.

1. Emblem's Contention That Artesian Cannot Assess The Costs Of A Main Larger Than 8 Inches In Diameter As CIAC Is Wrong As A Matter Of Law.

Emblem contends that Artesian is barred by the Regulations from collecting the costs of a main with a diameter of greater than 8 inches through CIAC. See, *e.g.*, Ex. 111 at 13:14-19; Ex. 112 at 4:9-13; *id.* at 13:1-5; *id.* at 15:12-14. The text of 26 Del. Admin. C. § 3.8.2 refutes that contention by providing that Artesian can collect the expense of mains of greater than 8 inches if they are necessary to service the new development on a stand-alone basis. The Category 1B Costs portion of that regulation states in relevant part:

In determining whether Category 1B Costs are directly assignable to a project, or elected as company betterment, the CIAC shall be calculated based on the cost of installing Mains using a minimum of 8 inch diameter pipe, *provided, however*, that where Mains of a larger diameter are required by applicable laws, building or fire codes, or engineering standards to provide water service to the project on a stand-alone basis, the CIAC shall be calculated based on the cost of installing Mains using such larger diameter pipe.

Id. As previously explained in Section III.B above, Artesian determined through the use of its modeling system that it could not provide adequate fire flow service to Emblem's development (in the absence of an additional booster station, the cost of which Artesian was not assessing to Emblem) unless it used a 16 inch diameter main. See Compl. ¶ 25; Ex. 58; Tr. 184:9-185:17. The alternative would have been to assess CIAC to Emblem for both a booster station and a lesser diameter main, which would have been more expensive. Tr. 185:24-186:12. Emblem does not challenge Artesian's modeling calculations. Tr. 376:10-17; *id.* 453:5-15. Accordingly, all of the conditional language in Regulation 3.8.2 is met: for the Emblem development on a stand-alone basis, a main of larger than 8 inch diameter was necessary to comply with fire codes

and applicable engineering standards. As a consequence, Regulation 3.8.2 requires Artesian to calculate Emblem's CIAC charge based upon the larger diameter pipe, and Emblem's contention fails as a matter of law.

2. Emblem's Alternative CIAC Calculation Fails To
Recoup The Expense Of The Main From The
Developers As Required By The Regulations.

As an alternative to its contentions that Emblem should not be required to pay any CIAC, Emblem contends that it should pay far less CIAC than Artesian has demanded. Ex. 112 13:19-14:16. To that end, Emblem's witness Ted Williams – who was proffered as an expert in civil engineering, land use, and land development plans, *not* water utilities, calculating the size mains necessary to deliver water to a development (Tr. 453:5-15), Docket 15, the Regulations or CIAC (Tr. 447:5-18) – performed a simplistic calculation, dividing the capacity of water that can fit in a 16 inch main like the 273 Main by Emblem's anticipated daily use. Ex. 112 at 13:19-14:22. Mr. Williams opined, based upon that math, that Emblem should be required to pay a maximum of 1.915% of the cost of the 273 Main, with an additional deduction for the difference between the expense of an 8 inch main and a 16 inch main because, purportedly, the Regulations mandate that use of any main of larger than 8 inches is solely for company betterment and therefore excluded from Category 1B Costs. *Id.* at 14:2-8.

Mr. Williams' opinion should be rejected because he lacks the expertise to correctly allocate CIAC among multiple costs causers. Indeed, he admitted that he is not an expert in allocating CIAC among multiple developments that are being serviced by the same improvement. Tr. 447:5-18. In Mr. Williams' land use experience, he had never encountered a situation where an improvement would serve more than one development. Tr. 448:14-21. Accordingly, he is not equipped to opine on the appropriate allocation of the cost of the 273

Main among the five Mall developments. Even if the Commission is willing to give some weight to his opinion, however, his methodology is defective as a matter of law and fact and must be rejected.

Legally, the Regulations mandate that *all* of the costs of Facilities that fall within Regulations 3.8.1 and 3.8.2 must be recovered through CIAC. Regulation 3.8. CIAC can *only* be assessed to “contractors, builders, developers, municipalities, homeowners, or other project sponsors”. Regulation 3.8.1. That accomplishes the Commission’s policy from Docket 15 that, with the adoption of the Regulations, current customers will not be required to pay the costs of expanding service to new development. Accordingly, Artesian selected a methodology for allocating the CIAC for the 273 Main that recovered the cost from the Mall developments that needed it for service. The five new developments at the Mall would not have adequate fire flows or water service unless Artesian installed the 273 Main, so each would be required to contribute. Tr. 54:6-55:11; *id.* 57:14-58:15. As previously explained in Section II.C above, Artesian allocated the cost ratably based upon the developments’ comparative projected consumption. Doing so results in the new development that uses the most water paying the largest share of CIAC, yet results in full recovery of the cost of the 273 Main as required by Regulation 3.8.2.¹⁰ Staff’s and Artesian’s experts agree that this is an equitable and appropriate way to collect the

¹⁰ During its most recent rate case proceeding, Artesian calculated the cost of the 273 Main as \$1,350,000 and used that number when allocating CIAC among the five new developments. The final cost of the 273 Main was slightly more than \$1,400,000. The 273 Main provided “looping” for Artesian’s system in the region of the Mall, meaning improved flows by being able to draw water to the area from more than one place. Tr. 59:3-60:14. Accordingly, Artesian determined that it was appropriate to include the difference between the actual and estimated costs in rates to reflect some benefit to the existing customers in the Mall area. Tr. 638:19-639:24.

cost of the 273 Main from the cost causers, as the Regulations require. Tr. 173:13-174:21; *id.* 640:2-13.

Emblem's methodology does not even come close to recovering the full cost of the 273 Main through CIAC as Regulation 3.8.2 requires. Tr. 278:17-279:4; *id.* 495:12-18. This is unsurprising as Emblem's methodology is not one derived from a water industry standard, practice or regulation. Tr. 492:6-13. Using Emblem's method, Cinemark would have only been required to pay 0.1% of the cost of the 273 Main, Fashion Center would have paid 2.5%, Market Place 5.5%, and Cabela's less than 1%. In the aggregate, the five developments would pay less than 10% of the 273 Main, leaving existing customers to pay more than 90% (in addition to what customers are contributing to the booster station). Tr. 494:4-495:18. This fails to comply with, and subverts the purpose of, the Regulations. Regulation 3.8.2. Moreover, even if Emblem's methodology was legitimate, a more accurate measurement of the new developments' impact would be determined by dividing the capacity of the main by each new development's combined fire flow and ordinary usage, rather than ordinary usage alone, because fire flows account for fully 90% of the line capacity necessary to service a community. Tr. 86:17-87:21; *see id.* 493:9-17. Accordingly, even if the Commission was willing to entertain an alternative CIAC calculation, the one suggested by Emblem must be rejected as a matter of law and fact.

3. Emblem's Request To Shift The CIAC Charge To Artesian's Stockholders Must Be Rejected.

By statute, rate base includes (among other things) the "original cost of **all** used and useful utility plant". 26 Del. C. § 102(3) (emphasis added). Similarly, Section 302, which allows water utilities to include plant in rate base before it is fully used, provides in relevant part that, unless circumstances which are not present in this rate proceeding exist:

the Commission **will include in the utility's rate base, treat as used and useful utility plant, and, accordingly, allow to be fully recovered in the utility's rates without imputation of revenues, all costs which are incurred by the water utility, in the exercise of its good faith business judgment, in constructing facilities** (including without limitation supply, treatment and transmission facilities) to serve the needs of existing customers **or of persons who are reasonably anticipated by the water utility to be its customers within 3 years** from the date used by the Commission to recognize rate base in the rate proceeding.

Id. (emphasis added). The effect of Section 302, by mandating that the original cost of all used and useful plant will be included in rate base, is utility stockholders cannot be required to pay for utility plant. This is why, if Emblem is excused from paying its share of the CIAC, Artesian's current customers will bear that expense in rates. Tr. 127:21-24;¹¹ The Commission, of course, must comply with Delaware's statutes. Accordingly, Emblem's contention that Artesian could be ordered to bear Emblem's share of the 273 Main CIAC charge must be rejected as a matter of law. Furthermore, it would be inappropriate to, in effect, punish Artesian for having complied with the Commission's Regulations. The Regulations require Artesian to assess a CIAC charge to Emblem in the circumstances of this case and Emblem cannot point to a single statute, regulation or precedent that Artesian has violated by doing so.

¹¹ During the evidentiary hearing, in response to the question "if the Hearing Examiner and the Commission find Artesian did not follow the Regulations, and Emblem is not required to pay the 1B CIAC, there's another option other than ratepayers picking up the costs. Right?", Staff's witness opined that Artesian could be ordered to bear the cost. The evidence, of course, proves that Artesian followed the Regulations and Emblem is required to pay CIAC for the 273 Main, but even if that were not so, Artesian could not be ordered to pay for the infrastructure because of Section 302.

F. Artesian Did Not Violate Any Notice Requirements And The Commission Should Reject Emblem's Policy Contention That It Should Not Be Required To Pay CIAC Because It First Received Notice That It Must Contribute When It Was Ready To Begin Construction.

Emblem claims that it should not have to pay CIAC because it only received notice that it would be expected to contribute when it was ready to proceed with construction. In support of that theory it asserts the following arguments: (1) Artesian's failure to provide notice of the charge sooner is not merely one of omission, but rather Artesian had already certified that CIAC would not be charged when it provided a WCC and did not describe any plans to provide additional water supply (Ex. 111 at 12:7-14); (2) New Castle County's approval of Emblem's development plan in 2011, which included water system plans, gave Emblem a five year window of opportunity to start construction and Emblem said in a cover letter that the project might not be fully developed until 2016, so Emblem did not think CIAC could be assessed in July 2015 (Ex. 111 at 5:17-20); (3) Emblem was treated differently than other developers at the Mall, who were informed they would be expected to contribute to the cost of improvements to water service at the Mall when they received WCCs from Artesian (Ex. 111 at 11:13-15; Ex. 112 at 8:2-6); and (4) in Docket 15, Staff's witness testified that the current CIAC Regulations would allow developers to include the CIAC charges in rents and sales prices, but here Emblem learned of the charge after it had already closed the financing for its project and calculated maximum rents that it could charge (Ex. 119 at 7:8-10; Ex. 111 at 11:16-12:6).

As an initial matter, Emblem, Staff and Artesian all agree that the Regulations do not set any particular time or event by which utilities must inform developers that they will be required to pay CIAC. Tr. 300:12-21 (Artesian); *id.* 462:6-15 (Emblem); *id.* 622:22-623:3 (Staff); *id.* 652:6-10 (Staff). Conversely, the Regulations require in absolute terms that Artesian

must assess CIAC to Emblem, because additional infrastructure was necessary to provide Emblem necessary fire flows. Regulations 3.8 through 3.8.2; Ex. 58. Therefore, Emblem must pay the CIAC charge regardless of when it first learned it would be due, and Artesian would have violated the Regulations if it had not insisted that Emblem pay. Emblem is not asking that the Regulations be enforced, it is asking that it be excused from complying with them. None of Emblem's arguments justify such a deviation, particularly in the circumstances of this case.

Emblem's first two contentions on this issue are both wrong for the same reason. As previously discussed herein several times, New Castle County's UDC and WCC form have no bearing on CIAC. *See* Section III.A above. Artesian's WCC did not certify that all necessary infrastructure was present (and could not have done so as Emblem had not yet built the on-site system), and the WCC did not mean that any developer who asked for a WCC after Emblem would be obligated to pay all CIAC for any improvements that became necessary. *Id.* Neither the WCC nor New Castle County's approval of its plan made Emblem immune from CIAC, because New Castle County has no authority to regulate CIAC and the Regulations require Emblem to pay it. *Id.* For the same reason, it is irrelevant that New Castle County allows a developer a five year period to begin construction after final approval of the development plan.¹²

¹² Even if the five year window granted by New Castle County was relevant, which it is not, Emblem fails to mention damaging facts about this timing issue. Firstly, the application for a WCC that Emblem filled out for Artesian's consideration stated that the project start date was 2011, with water service needed in 2011. Ex. 2; Tr. 75:7-77:3. Secondly, Artesian was aware that the ODW had only given Emblem a one year approval to construct in October 2010. Ex. 19 at AWC0017 ¶ 1. Artesian learned after this dispute arose that Emblem sought one year extensions in 2011, 2012, 2013 and 2014, but Emblem did not inform Artesian about those delays as they occurred. Tr. 364:5-365:3. Moreover, Emblem never informed Artesian that New Castle County gave final approval to its plan in September 2011, so Artesian had no way of knowing if or when the five year period would have started, or when Emblem might actually need water service. *Id.*

Emblem's allegation that it was treated differently than other developers at the Mall who were informed that they would be expected to pay CIAC through a cover letter enclosing their WCCs is only partially true – and any minor differences in treatment were not Artesian's "fault" and cannot excuse Emblem from paying CIAC. As a threshold matter, no Regulations require utilities to provide advance notice of CIAC to developers, who are obviously expected to know the law governing the acquisition of utility service for their developments.

By late 2012, Artesian had received so many requests for WCCs in the area of the Mall that it knew additional infrastructure would be necessary. Tr. 267:9-269:2. When it gave WCCs to Cabela's, Cinemark and Market Place, Artesian stated that they would be expected to contribute to the cost of improvements that would be installed. Tr. 174:24-177:3; *id.* 269:3-270:10. Those cover letters, however, did not state the amount that would be required or the methodology by which the cost would be allocated among the new developments. Tr. 174:24-177:3; *id.* 269:3-270:10. It was only when Cabela's and Cinemark were ready to start construction that they learned how much they must pay and how Artesian had calculated the amount. Tr. 170:8-171:9; *id.* 173:8-16. Both paid what was required. Ex. 34. Market Place has not started construction yet, so it still has not been informed by Artesian how much it will be required to pay. Tr. 282:3-9.

The Fashion Center, on the other hand, received the exact same notice as Emblem – none until it was ready to build. Tr. 306:18-307:8. The Fashion Center first requested a WCC more than eight years before Emblem did, but did not receive one until several months after Emblem. Ex. 17. When it asked to connect to Artesian's water system in August 2013, it learned for the first time that it was expected to pay CIAC, the amount it must pay, and Artesian's methodology for allocating the cost between the new developments. Ex. 36. The

Fashion Center paid \$731,960 in CIAC towards the 273 Main and new booster station. Ex. 40. Accordingly, there was no meaningful difference in the way Emblem, as opposed to the other developers at the Mall, were treated – and no distinction at all between the treatment of Emblem and the Fashion Center. Indeed, if the Commission reduces or waives the amount of CIAC that Emblem must pay, it is foreseeable that the Fashion Center (and perhaps many other developers who paid CIAC in analogous circumstances) may seek the return of some of the monies that have been paid.

Emblem's final contention, that Docket 15 was intended to provide cost certainty to developers by letting them know in advance how much they would be expected to pay in CIAC, is historical revisionism and a twisting of the truth. What must be remembered is that the new Regulations included two major changes from what had been the practice: (1) payments from developers must now be in the form of CIAC as a permanent infusion of capital, rather than in the form of an Advance, which would allow some return to the developer over a period of years as new customers join the utilities' systems; and (2) the adoption of Category 2 Costs at a flat rate, designed to compensate current customers for the benefit that new customers receive by joining a mature water system. Regulations 3.8 & 3.8.2; PSC Order No. 6814 at Ex. A pp.5-6. Comparing CIAC to Advances, the former gives developers greater cost certainty, because the amount paid is not off-set over years or decades, as had been the practice with Advances. PSC Order No. 6814 at Ex. A ¶ 14. Similarly, the assessment of Category 2 Costs through a flat rate that was designed, on balance, to be less than the full cost that the new customer might otherwise bear for indirect costs, while giving the developer a readily calculable cost in advance of construction. *Id.* at Ex. A ¶¶ 31-32. Emblem and its affiliates have enjoyed some cost certainty in this case because of the way these costs are regulated – Emblem planned for the Category 1A

Costs and Category 2 Costs that would be required, even if Emblem did not realize that the expenses in its budget constituted CIAC charges. Tr. 325:10-326:11; *id.* 357:18-23.

The “cost certainty” discussed in Docket 15 pertained to these new aspects of the Regulations, not developers being told the amount of CIAC they must pay when receiving a New Castle County WCC, as Emblem claims in this proceeding. Ex. 111 at 10:23-11:7. Emblem emphasizes Ms. McDowell’s Docket 15 testimony that CIAC should allow developers to recover the expense through rents and prices. Ex. 119:8-10. Here, Emblem complains that it did not know about the Category 1B Costs that it would be expected to pay until after it had closed its financing. One response is that advance notice to developers was apparently not important enough during Docket 15 to result in a regulation addressing the issue – and numerous builders (including the Association and Reybold) participated throughout that public proceeding. From Artesian’s perspective, it is appropriate that there is no such regulation, because when the developer is ready to construct is when a utility can say definitively whether CIAC is necessary, and if so, how much must be paid. Tr. 157:5-10. If Artesian is required to certify whether Category 1B Costs will be imposed at an earlier point, such as when providing a WCC, the effect would be to shift the risk that a charge will be necessary from the developer to existing customers. Tr. 110:9-111:7; *id.* 627:15-21.

Artesian has no mechanism or staff for tracking all of the WCCs it issues, so that it could “check in” with developers periodically to find out the state of development and give them advance notices or estimates of CIAC. Tr. 272:19-24.¹³ Setting up such a tracking system

¹³ Artesian’s undisputed testimony is that Cabela’s, Cinemark and Market Place only received advance notice that they would be required to contribute to improvements that were being installed because they had contacted Artesian for WCCs at a point in time
(continued . . .)

would be difficult and expensive, particularly as projects change (as happened with Fashion Center and Emblem), developers change (as happened from M-C Development Associates to Emblem), and projects often are delayed (Fashion Center, Emblem and Market Place all experienced delays lasting years). Tr. 73:23-74:20; *id.* 273:10-274:20; *id.* 154:8-156:13. The obvious point is that developers are, and should be, responsible for keeping utilities informed of their progress and asking for cost estimates for purposes of their planning and financing.

Emblem's allegations that the timing of Artesian's CIAC notice was somehow wrongful is particularly wrong-footed given all of the flags that Emblem received that a charge would be necessary and all of the opportunities for communicating with Artesian about its project Emblem let pass. As previously noted, Emblem did not inform Artesian when its plan received final approval from New Castle County. Tr. 364:5-15. Similarly, Emblem did not copy Artesian on any communications with ODW when it received one year extensions of its approval to construct between 2011 and 2014. Tr. 360:14-365:20. If one looks at the chronology in Section I.D above, it is striking that Emblem was communicating with ODW a mere three days after Artesian made the first preliminary calculations of how CIAC would be allocated among the Mall developers in June 2013. If Emblem had copied Artesian then, it might have learned promptly that Category 1B Costs would be assessed.

The fact is, however, that Emblem received unmistakable information that CIAC might be required. In April 2014 Emblem received a letter from Artesian stating that a main was being installed by its property to improve the reliability of water service in the area of the Mall.

(. . . continued)

(when they wanted to build) when Artesian was certain it would be necessary. Tr. 285:17-286:6.

Ex. 4. Indeed, Emblem sent workers to watch Artesian's crew as it installed the 273 Main along the length of its property, because it was concerned that something might happen to its property. Tr. 366:10-368:17. Emblem simply assumed that the 273 Main had nothing to do with it, and did not bother to contact Artesian about it. *Id.* Moreover, in August of 2014, a contractor working for Emblem's parent entity (Emblem itself did not exist yet) informed it that the Fire Marshal would not accept the fire flow test that had accompanied Emblem's 2010 WCC. Ex. 107 at EA000087. After contacting Artesian about having a new test performed, the contractor informed Emblem's affiliate that it might be better to wait a few weeks, because Artesian was finishing an upgrade to the system that would increase flow and pressures at its property. Ex. 107 at EA000087. From this knowledge, combined with watching Artesian install the 273 Main, Emblem should have known that the newly installed infrastructure directly affected its property.

In the end, Emblem was formed in June 2015 and closed the financing on the development the same month. Tr. 358:8-17. Less than a month later, another Emblem contractor asked Artesian for permission to connect to its system, resulting in Emblem being told it must pay CIAC. Tr. 358:18-22. Emblem asked Staff's witness whether it would have been better for Artesian to inform it that CIAC would be required in 2013 when it started to calculate what the developments would pay. Tr. 599:21-600:6. Emblem misses the point. This case is in great measure the product of Emblem's mistaken assumptions about what Artesian had certified in the WCC, compounded by Emblem's failure to communicate with Artesian about its project for nearly five years. Tr. 587:12-588:16. Emblem thinks that Artesian should track the WCCs it has issued and communicate with developers if the circumstances change such that the standards set forth in the WCC cannot be met unless additional facilities are installed. Tr. 604:11-605:7. Staff and Artesian believe that if a developer delays construction for five years, it should be

communicating with the water utility about the status of its project. Tr. 604:11-24. Indeed, Emblem's own witness, Mr. Williams, testified that if he had correctly understood the CIAC Regulations when he was managing the project for Emblem, he would have recommended that Emblem contact Artesian about a possible CIAC charge in August 2014. Tr. 484:2-485:16. Given the actual notice that Emblem received about the installation of water utility infrastructure *at its property* that would affect the water service *at its property*, it would have been reasonable for Emblem to ask Artesian if anything had changed. Ex. 4; Ex. 107 at EA000094-95; Tr. 365:21-372:7. In the end, neither Artesian nor Emblem violated any Regulations or other law because of the manner in which they communicated with each other and the Regulations require Emblem to pay CIAC. As the Regulations affirmatively require Emblem to pay, the communications between the parties are not a basis for excusing it from doing so.

If Emblem does not pay the charge, the expense would remain in rates, meaning Artesian's current customers pay for Emblem's development. 26 Del. C. § 302. As previously explained, Artesian's current customers are already paying for most of the infrastructure that was installed. Tr. 636:9-639:24.¹⁴

G. Granting Emblem Relief Would Cause Negative Consequences In The Regulation Of CIAC.

Finally, Artesian notes that if Emblem is granted any relief in this proceeding, it is foreseeable that the following adverse consequence would ensure in connection with the Commission's regulation of CIAC:

¹⁴ Emblem's President testified that the other developers at the Mall should be required to pay Emblem's allocation. Tr. 375:22-376:2; Ex. 112 at 12:7-23. They are not parties to this proceeding. If the Commission is inclined to require them to pay additional CIAC for this project, they should first get an opportunity to appear and be heard.

- Most importantly, Artesian's existing customers would bear Emblem's share of the expense of the 273 Main, because that cost must be included in rates if it is not collected through CIAC pursuant to 26 Del. C. § 302(a) and PSC Order No. 6814 at Ex. A ¶¶ 59-61. This would reverse the policy that the Commission established in the most recent Docket 15 proceedings;
- If Emblem pays less CIAC because it did not have notice that it would be required to pay until it was ready start construction, it is foreseeable that Artesian may be required to remit funds to the Fashion Center (and perhaps many others), because it too was not given any notice that it would be required to pay CIAC until it was ready to build;
- If Emblem pays less CIAC because the Commission accepts its interpretation of the Regulations as requiring the collection of CIAC before installing the new plant, Market Place and all of the entities listed in Exhibit 44 will never have to pay their share of CIAC either;
- If Emblem pays less CIAC because the Commission accepts its interpretation of the Regulations as requiring the collection of CIAC before installing the new plant, it is probably that developers may find their projects delayed because: (a) some other developer has failed to pay its portion of the CIAC; or (b) Artesian cannot begin installation until the full CIAC amount had been paid.
- If Emblem pays less CIAC because the Commission accepts its alternative calculation of what it should pay based upon its calculation of how much of the new facilities it may use: (a) utilities will no longer be able to collect "all" of the cost of Facilities that fall within Regulations 3.8.1 and 3.8.2; and (b) existing customers will pay more of the cost of extending water service to new development;
- If Artesian is required to demand CIAC prior to providing a New Castle County WCC because the Commission construes that form as certifying all distribution facilities exist as of that date, the risk that system conditions may change between the certification date and the date the developer chooses to build shifts from the developer to Artesian and its current customers;
- If Artesian is required to demand CIAC prior to providing a New Castle County WCC because the Commission construes that form as certifying all distribution facilities exist as of that date, Artesian may refuse to provide WCCs going forward, effectively ending the approval process for new developments in New Castle County;
- If the Commission accepts Emblem's position that New Castle County has the power to mandate the date by which a utility demands CIAC, the

administration of CIAC will vary depending upon the county in which development is occurring;

- Other developers will be incentivized to file complaints, hoping to pay less in CIAC. Litigation costs such as Artesian is incurring in this proceeding to refute Emblem's claims are ordinary operating expenses that ultimately are included in rates. Accordingly, rates may eventually rise because of the uncertainty introduced in whether CIAC must be paid.

CONCLUSION

For all of the foregoing reasons, Artesian Water Company, Inc. respectfully requests that the Commission uphold Artesian's CIAC assessment to Emblem as just and reasonable and dismiss Emblem's Complaint with no award of relief.

MORRIS, NICHOLS, ARSHT & TUNNELL LLP

/s/ Karl G. Randall

R. Judson Scaggs, Jr. (#2676)

Karl G. Randall (#5054)

1201 N. Market Street

P.O. Box 1347

Wilmington, Delaware 19899-1347

(302) 658-9200

Attorneys for Artesian Water Company, Inc.

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